

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2015-05ST
May 3, 2018

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the department's official position concerning a specific issue.

ISSUES

Sales and Use Tax - Tangible Personal Property Converted into Real Property

Authority: [IC 6-2.5-1-14.7](#); [IC 6-2.5-1-14.9](#); [IC 6-2.5-1-27](#); [IC 6-2.5-1-27.7](#); [IC 6-2.5-2-1](#); [IC 6-2.5-2-2](#); [IC 6-2.5-3-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-9](#); [45 IAC 2.2-4-1](#); Sales Tax Information Bulletin #60 (November 2017).

A taxpayer ("Company") is seeking an opinion as to whether Company's contracts with its customers are for the installation of construction material that is converted into real property.

STATEMENT OF FACTS

Company is an Indiana corporation that operates an asphalt and concrete plant. Company provides the following information regarding its particular issue:

Our particular question concerns the delivery and installation of "Flowable Fill." Flowable Fill [or "Fill"] is a product that pours like concrete or asphalt. However, it isn't applied to the surface of the earth. Flowable Fill is used as a better replacement for earth, sand and gravel to fill the linear ditches and holes in the ground where underground gas or water pipe (owned by the utility companies or municipal utilities) is being laid, either for the first time or is being replaced after repair.

Since the fill starts as a slurry of sorts, it finds its way completely around the underground pipe and then fills up the ditch or hole (which can be as deep as 20 feet or more) to within a few inches of the ground surface. The fill hardens and then blacktop or concrete road is laid on top of the fill. The result is far superior to typical fills such as dirt and gravel.

DISCUSSION

Based on the foregoing facts, Company requests a ruling as to whether it is installing construction material that become incorporated into real property. If so, Company maintains it can contract under the lump sum method and pay use tax on the material cost of the Fill.

Pursuant to [IC 6-2.5-2-1\(a\)](#) and [IC 6-2.5-2-2\(a\)](#), sales tax is imposed on retail transactions made in Indiana. A retail transaction is defined in [IC 6-2.5-4-1\(b\)](#) as the transfer, in the ordinary course of business, of tangible personal property for consideration. [IC 6-2.5-4-1\(c\)](#) goes on to provide in pertinent part:

For purposes of determining what constitutes selling at retail, it does not matter whether:

(2) the property is transferred alone or in conjunction with other property or services . . .

"Tangible personal property" is defined in [IC 6-2.5-1-27](#) as:

. . . personal property that:

- (1) can be seen, weighed, measured, felt, or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.

A contractors' sales and use tax responsibilities with respect to the purchase, use, and sale of construction material are found in subsection (c) of [IC 6-2.5-3-2](#), which provides the following:

(c) The use tax is imposed on a contractor's conversion of construction material into real property if that

construction material was purchased by the contractor. However, the use tax does not apply to conversions of construction material described in this subsection, if:

- (1) the state gross retail or use tax has been previously imposed on the contractor's acquisition or use of that construction material;
- (2) the person for whom the construction material is being converted could have purchased the material exempt from the state gross retail and use taxes, as evidenced by a properly issued exemption certificate, if that person had directly purchased the construction material from a retail merchant in a retail transaction; or
- (3) the conversion of the construction material into real property is governed by a time and material contract as described in [IC 6-2.5-4-9\(b\)](#).

[IC 6-2.5-4-9](#) further deals with a contractor's sales and use tax liability in construction contracts as follows:

- (a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:
 - (1) is to be added to a structure or facility by the purchaser; and
 - (2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located.
- (b) A contractor is a retail merchant making a retail transaction when the contractor:
 - (1) disposes of tangible personal property; or
 - (2) converts tangible personal property into real property;under a time and material contract. As such a retail merchant, a contractor described in this subsection shall collect, as an agent of the state, the state gross retail tax on the resale of the construction material and remit the state gross retail tax as provided in this article.
- (c) Notwithstanding subsections (a) and (b), a transaction described in subsection (a) or (b) is not a retail transaction, if the ultimate purchaser or recipient of the property to be added to the structure or facility would be exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

"Construction material" is defined in [IC 6-2.5-1-14.7](#) as "any tangible personal property to be converted into real property." [IC 6-2.5-1-14.9](#) defines "Contractor" as "any person engaged in converting construction material into real property on behalf of another person. The term includes, but is not limited to, general or prime contractors, subcontractors, and specialty contractors." Finally, "time and material contract" is defined by statute at [IC 6-2.5-1-27.7](#) to mean "a contract in which the cost of construction material and the cost of labor or other charges are stated separately."

There is a difference in the tax collection and remittance requirements for construction material purchased by a contractor, which depends on whether the contractor is operating under a time and material contract or non-time and material contract (in this case, a lump sum contract). The Department's guidance on the topic is found in Sales Tax Information Bulletin #60 (November 2017). In interpreting [IC 6-2.5-3-2\(c\)](#), the Bulletin provides that when operating under a lump sum contract, contractors "purchase construction material for their own use or consumption in the fulfillment of contractual obligations to provide real property improvement services." Therefore, when a contractor operates this way, they "purchase construction material for their own use or consumption in the fulfillment of contractual obligations to provide real property improvement services." *Id.* A lump sum contractor's tax obligations would be the following:

- (1) pay sales tax at the time the construction material is purchased; or
- (2) self-assess and remit use tax at the time the construction material is converted into real property if that construction material was purchased or otherwise acquired without paying tax.

On the other hand, in interpreting the [IC 6-2.5-4-9\(b\)](#), Sales Tax Information Bulletin #60 provides that "contractors are retail merchants selling construction material when they (1) dispose of, or (2) convert construction material into real property under a time and material contract." *Id.* Due to sales of tangible personal property being subject to sales tax, which includes construction materials, "contractors converting construction material into real property under a time and material contract must collect and remit sales tax on the material portion of their contracts." *Id.*

Sales Tax Information Bulletin #60 provides additional guidance as to how the Department determines whether or not items remain tangible personal property:

"Construction Material" means any tangible personal property to be converted into real property.

1. Examples of construction material that may be converted into real property through incorporation or installation include, but are not limited to, doors, garage doors, windows, cabinets, garbage disposals, water heaters, water softeners, alarms, furnaces, central air conditioning units, gutters, carpeting and other flooring materials, drywall, lumber, asphalt, concrete, fencing, trees, shrubbery, and pre-fabricated construction material.
2. Examples of items that typically remain tangible personal property, and, therefore, *are not* considered construction material, include, but are not limited to, personal computers, televisions, refrigerators, stoves, dishwashers, clothes washers and dryers, window air conditioning units, and other removable items such as furniture.
3. Construction material that has been converted into real property when it has been attached to or incorporated into real property in such a way that would lead one to reasonably believe the construction material has been permanently affixed to the real property. Construction material incorporated into real property becomes part of and indistinguishable from the real property into which it has been incorporated.
4. Conversions of tangible personal property into real property include incorporations and installations of tangible personal property into facilities or structures. Incorporations and installations of tangible personal property into facilities or structures may include improvements to and repairs of existing facilities or structures.

Company asserts that the Flowable Fill becomes part of the land where the pipe is installed. It is permanently attached to the land with the intention that it remains attached and underground for years to come.

The Department concurs with this conclusion. Flowable Fill is clearly incorporated into the real property, so it would qualify as "construction material." [IC 6-2.5-1-14.7](#). Company would therefore be considered a contractor when it installs Flowable Fill, as they would be a "person engaged in converting construction material into real property on behalf of another person." [IC 6-2.5-1-14.9](#). If Company wishes to operate under lump sum contracts, then it would be appropriate to pay use tax on the Fill when it is converted into real property if they have not already paid sales tax on the fill. [IC 6-2.5-3-2](#).

RULING

Company is a contractor that installs a construction material (Flowable Fill) and converts it into real property. Since it operates using lump sum contracts, Company must pay use tax on the Fill when it is converted into real property if they have not already paid sales tax on the fill. [IC 6-2.5-3-2](#).

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Posted: 06/27/2018 by Legislative Services Agency
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